IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

Om Nath vs. The State of Rajasthan.

D.B.Cri. Appeal No.44/1988

Under Section 374 (2) Cr.P.C. against the judgment dated 23.12.1987 passed by the Addl. Sessions Judge, Nagaur, in Sessions Case No.47/1986.

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Date of Judgment: 10th September, 2007.

PRESENT

HON'BLE MR.JUSTICE BHAGWATI PRASAD
HON'BLE MR.JUSTICE MUNISHWAR NATH BHANDARI

Mr.Doongar Singh for the appellant.
Mr.JPS.Choudhary, Public Prosecutor.

BY THE COURT :(PER HON.MR.BHAGWATI PRASAD,J.)-

The accused appellant Om Nath has filed this appeal being aggrieved by the judgment of the court of Addl. Sessions Judge, Nagaur in the matter of Sessions Case No.47/1986 dated 23.12.87.

The prosecution was initiated on the basis of a report lodged by Ladu Nath at Police Station Jaswantgarh on 24.03.86 at 04.30 PM. According to the first information report, the complainant was standing in front of his house at about 12.00 Noon. At that time five accused persons , including the appellant and four acquitted, came out of their houses and burnt his hut. At that time Sultan Nath , deceased was sitting on a trunk of a tree in the courtyard. After burning the hut, while the five accused were going away, at that time Sultan Nath asked a question as to why have they burnt the hut, this may cause burning of the whole village, on which all the five accused got enraged and said that he is the enemy , kill him and that time the four acquitted accused Gyan Nath, Chhitar Nath, Bana Nath and Mahendra Nath caught hold of Sultan Nath the accused appellant Om Nth inflicted an injury by knife on his neck. On hearing the shouts the first informant Manga Nath, Prem Nath, Narayan Nath and Bhanwar Nath came running. On the basis of such report investigation was conducted and charge sheet was filed against the accused appellants. The case was committed to the trial court which framed charges against the accused appellants under Sections 147, 148, 149 and 302 IPC .

The accused appellant denied the charges and claimed

trial. At the trial prosecution examined 15 witnesses and exhibited 19 documents. The accused was examined under Section 313 Cr.P.C. and examined 6 defence witnesses. After the trial, the accused appellant was convicted by the trial court under Section 302 IPC and sentenced him to undergo R.I. for life and to pay a fine of Rs.500/-, and in default of payment of fine to undergo one year's R.I. Rest of the four accused persons were acquitted.

Assailing the findings of the trial court, the learned counsel for the appellant stated that 5 eye witnesses were named in the first information report out of which 2, PW/4 Manga Nath, and PW/8 Prem Nath did not support the prosecution case. Three eye witnesses, namely, PW/10 Narain Nath, PW/2 Roop Nath and PW/3 Bhanwar Nath were examined to support the prosecution case and apart from these, one witness was examined by the prosecution, PW/11 Jodh Nath, who was not named as an eye witness in the first information report, Ex.P/10. Thus, the learned counsel stated that the prosecution has tried to create witnesses to support its case. Learned counsel further asserted that the trial court has categorically stated that participation of the four acquitted accused persons have been held by the trial court as unnatural because it is a case where only one injury was inflicted for which holding of the deceased was

not necessary. Further in the narration of its case the prosecution witnesses have not been certain as to which of the accused, who were said to have caught the deceased caught him in particular fashion . Thus, major part of the prosecution case has to be disbelieved by the trial court.

The learned counsel further stated that the prosecution has come with a wrong case that the accused has brought his hut on the day of occurrence itself. It is not possible to bring, made- hut and then establish it. Thus, the prosecution case in its very nature is not only unreasonable and false but cannot stand to the scrutiny of a judicial mind . Above all, why would the accused burn their hut. No immediate cause or reason is available in the prosecution case. In fact, the complainants were aggrieved by the accused having occupied the part of courtyard and it was on the doing of the complainants that fire broke out. The reason was that the deceased Sultan had stated that by burning the hut, fire will broke out to the whole village, is a situation which is not acceptable because if the prosecution story is correct then something which has been shifted on that very day itself could not have been such voluminous structure that it could cause a threat to the whole village. In fact , this part of the prosecution story is nothing but a falsehood . The son of the

deceased himself has accepted in his testimony that on the scene of occurrence where the hut has been burnt, stones of accused were lying. There was a limekiln also. The accused was in possession of that for about a year. Thus the very existence of the reason of the breaking out of the fire is subject to doubt as stated by the prosecution. Thus, the prosecution case deserves to be discarded in its entirety. No sane person would burn his own hut. If the hut was in existence for about a year then it should be expected that the complainant had a grudge then it was the doing of the complainant that the fire broke out. Otherwise, no motive is assigned to the accused persons.

The beginning of the story , as stated by the prosecution is unreasonable. Why Sultan would say that by burning the hut fire would break out in the whole village ?. There is no warrant for such an acquisition. In fact the accused were accosted by the complainant by burning their hut and being aggrieved in that process an injury has been caused to the accused Om Nath in right of private defence. Because, if his house is burned , he had a right to retaliate and in retaliation an injury has been caused and death has occurred, then it is in the right of private defence that the accused acted, and in that view of the matter, it cannot be said that the prosecution has

succeeded in bringing home a case against the accused appellant Om Nath, who has only caused a single injury and that being the position, he was well within the rights of self defence in protecting his property that he could cause that injury.

The learned counsel further stated that the complainants are facing a trial where acquisition against them for burning the hut is already pending. His case is that the present trial is a mistrial as having not been done simultaneously with the cross-case and thus the accused is entitled to acquittal.

Per contra, the learned public prosecutor submitted that it is incorrect to state that the present trial is a mistrial because it can not be a rule of thumb or a statutory requirement that cross case should always be tried together. It is only expediency that miscarriage of justice is to be avoided and if either of the parties think that if two trials are held it may so occur, the court may consider the same. This issue should have been raised before the trial court which in the instant case having not been seriously raised, cannot be made the basis of claiming a mistrial. The offence, as has been alleged against the complainants, was only to the extent of burning a hut, it was not even a sessions triable case, but all these

facts were not brought before the trial court and, therefore, accused cannot claim any prejudice on this count. The cross FIR has not even been filed before the trial court and, therefore, the accused have missed mentioning this factor before the trial court and in that background, if the trial were not held together no bonus can be asked for by the accused on this count. The acquitted accused were given the benefit of doubt because their participation was only to the extent of holding but then this cannot bring the case against the accused appellant Om Nath at par because he has caused a serious injury on the neck, resulting into vital blood vessels being cut and, therefore, offence under section 302 IPC is made out. From the evidence of the eye witnesses the implication of Om Nath is established, beyond reasonable doubt.

We have heard the learned counsel and have given our thoughtful consideration to the arguments and the documents obtaining on record .

This is true that the prosecution has not been able to bring out clearly as to how the incident started because there is variance in the prosecution case about the occupation of the land in question, where the hut was burnt. In the background whether the

question of possession was doubtful, as to when it was made, the prosecution case becomes a little doubtful about the beginning of the incident. It is difficult to conclude as to who lit the fire because it is very difficulty to assess , in absence of the evidence on record as to who the actual person was, who lit the fire to the hut. Because why would the accused do it if they were in possession of the piece of land for more than a year as stated by the sons of the deceased. Therefore, the prosecution case cannot be believed in its entirety. In this background if the story of the defence is taken to be true for the sake of argument that the hut was burnt first by the complainant then the remedy with the accused was to approach the lawful authority and not take law into his own hands by inflicting injury on Sultan.

It cannot be said with certainty that it was the deceased who was responsible for burning the hut. This is the subject matter of another trial, it will be decided there. But even if it is assumed that complainants were responsible, then there is no reason why the accused should be permitted to take law into his own hands. If the accused has taken law into his own hands then he has to suffer the consequences for that. But then it cannot be said that the accused was not having enough provocation to react . It cannot be said that it was a cold blooded assault which was made by the accused after

thoughtful preparation.

It was all of a sudden that the incident had occurred. Because if the story of the prosecution is taken then Sultan is said to have stated that as the hut is lit, fire may be break out to the whole village. This may be construed as an acquisition which is uncalled for. If the complainant lit the fire then accused should have been enraged and it can be said that accused Om Nath could react in this situation, though law forbids him to do so and he was to approach the lawful authority. In any case , if it was a sudden flare up, then the case of accused would not fall within the illustrations of Section 300 IPC but it would fall within exception I of Section 300 IPC and, therefore, we feel that the conviction of the accused under section 302 IPC has wrongly been recorded and consequently, his life sentence is also not proper.

Since the case of the accused appellant is covered by exception I of Section 300 IPC because there was sudden and grave provocation by burning of the hut, and by accosting of Sultan that the accused reacted and he had only caused single injury, which though have resulted into death, but was not so cruel as to bring the case of the accused within the illustration of Section 300 IPC. We

feel persuaded that the accused should be held guilty under section 304 (2) IPC because the injury was caused though with the knowledge but not with the intention of causing death. In in that light things having happened, the accused has to bear some responsibility of the same but he has remained behind the bars from26.03.86 to 23.12.87 and from 23.12.87 to 28.07.88, i.e. for a period of around three years. We feel that having been released on bail in the year 1988, now awarding a greater sentence would not be in the interest of justice. Therefore, his sentence is reduced to the period already undergone.

In the result, the appeal is partly allowed, the conviction and sentence under section 302 IPC is set aside instead the accused is held guilty under Section 304 (2) IPC and is sentenced to the period already undergone. He is on bail, his bail bonds are cancelled. He need not surrender.

(MUNISHWAR NATH BHANDARI), J. **(BHAGWATI PRASAD), J.**

L.George